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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 987.

SABINE TOWING COMPANY, INCORPORATED,

Petitioner,

versus

CONTINENTAL INSURANCE COMPANY, INCORPORATED,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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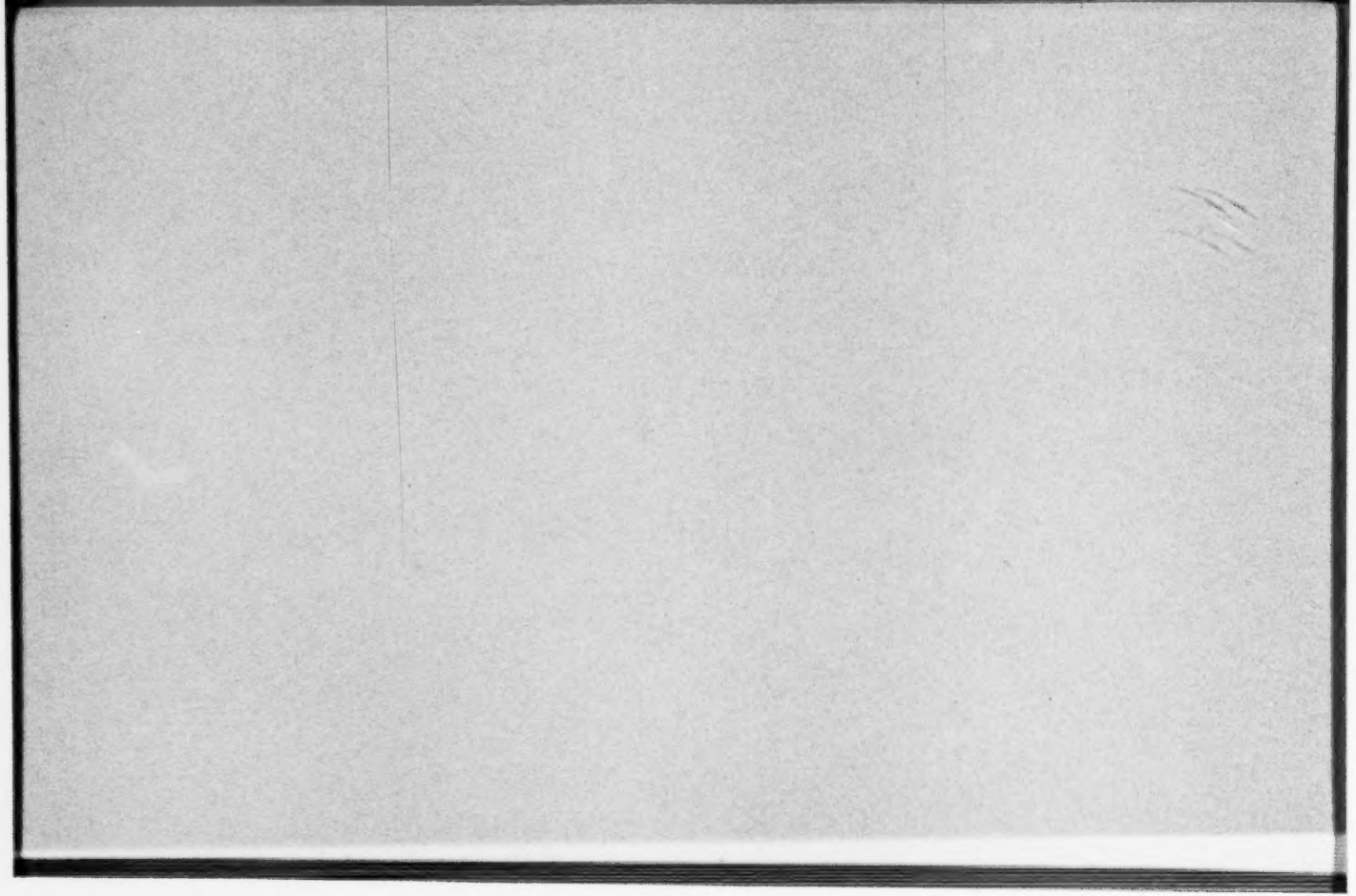

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Nature of the Case.

This case involves the construction of a contract of insurance which contained the following provision:

> "This Company hereby undertakes to make good to the Assured or the Assured's executors, administrators and/or assigns, all such loss and/or damage and/or expenses as the Assured shall, without fault or privity on the part of the Assured, become liable to pay and shall pay, * * *."

The petitioner asked both Courts below to rule as a matter of law that the words of limitation, "without fault

or privity on the part of the Assured," mean a deliberate, intentional or wrongful act or negligence so gross as to amount to such, that is, fraud. Petitioner also asked the Courts to admit parol evidence which it claimed proved that the words had that meaning in the insurance industry. The District Court ruled that the words had the meaning contended for by the petitioner, apparently relying upon the authority of three cases—*Moore* v. *Eagle Star & British Dominions Ins. Co.*, 5 Fed. (2d) 358, affd. 9 Fed. (2d) 296; *Hanover Fire Ins. Co.* vs. *Merchants Transport. Co.*, 15 Fed. (2d) 946, and *Sorenson* v. *Boston Ins. Co.*, 20 Fed. (2d) 640,—not realizing that the insuring clauses in the contracts under consideration in those cases did not contain the limiting phrase "without fault or privity on the part of the assured". The Circuit Court of Appeals held that that construction would amount to striking the words out of the policy entirely and parol evidence was not admissible to contradict the plain meaning of the contract, and that the parol evidence offered not only failed to prove a trade meaning of the words "fault or privity", but proved that there was no such trade meaning.

The Reasons Assigned by Petitioner For Granting a Writ.

The petitioner claims:

1. There is a conflict between the decision of the Circuit Court of Appeals and other Circuits on the question of the application of the parol evidence rule; and

2. The question involved is of public importance.

The Circuit Court of Appeals Correctly Interpreted the Contract of Insurance.

The petitioner practically urges the striking out of the contract the words "without fault or privity on the part of the Assured".

In *The Morro Castle* (*New York & Cuba Mail S. S. Co. v. Continental Ins. Co.*), 32 Fed. Supp. 251, 257, Judge Goddard after referring to the cases cited by the petitioner herein to support its contention, said:

> "* * * these cases involve suits on 'all risk' policies, in which the rule of law is that the vessel owner cannot recover on the policy if some act of his which contributed to the loss was wilfully and grossly negligent. * * *"

The Circuit Court of Appeals for the Second Circuit agreed with Judge Goddard in his interpretation of the contract (117 Fed. (2d) 404) but reversed him on other grounds.

The Circuit Court of Appeals in this case said:

> "Appellee's reliance on the Federal cases it cites will not do, for those were suits on protection and indemnity policies providing general coverage and containing no clause such as that found in these policies limiting the insurer's liability to losses occurring without the fault or privity of the assured. *Cf. The Morro Castle,* 32 Fed. Supp. 251. Their holdings that, even under such open policies, no recovery could be had where the loss was the result of willful, deliberate or intentional acts or of negligence so gross as to amount to this, the result in short of *dolus malus* or wrongdoing, but emphasize, as do the holdings of the English courts, the correctness of

> appellant's position, that the insertion in the policy of the words 'without privity or fault of the assured' was with purpose and effect, and that a policy containing these limiting terms should not be construed as are policies not containing them. For such a construction giving no effect whatever to the limitation, would in effect write it out of the policy. But this is not all, for while we have been referred to no cases construing these words when used in a policy, there are, as we have seen in the notes, *supra,* cases in abundance construing them when used in statutes, both English and American. * * *."

Petitioner states on page 27 of its brief, in reference to the *Hanover* case, *supra*:

> "* * * That because the record showed that the clause limiting insurer's liability to losses occurring without the 'fault or privity' of the assured was not contained in that policy, the majority opinion of the Fifth Circuit Court of Appeals herein considered that case inapplicable. But the reasoning given by that court, if applied, would have compelled a different interpretation given these policies, and one in accord with the parol testimony offered by petitioner herein."

This is a plain *non-sequitur.*

In reference to *Sorenson* v. *Boston Insurance Co., supra,* petitioner states (p. 29):

> "* * * this latter case, the same as the preceding one, was not considered as applicable by the majority opinion of the Circuit Court herein, because the record therein showed that the clause, as herein involved, was not contained in the policy therein. However, the reasoning given therein for a Protection and Indemnity policy, as also given in the pre-

> ceding case, was totally ignored by the majority opinion of the Circuit Court herein."

The petitioner asks this Court to give all marine insurance contracts dealing with P. & I. risks the same construction, regardless of the language of the contracts themselves.

There is no conflict between the decision of the Circuit Court of Appeals and the decisions relied upon by the petitioner in its brief to show such conflict.

Peters v. *Warren Insurance Co.*, 14 Peters 99, did not involve any parol testimony. It is merely a case of the construction of the contract of insurance on legal principles.

In *E. I DuPont de Nemours & Co.* v. *Claiborne-Reno Co.*, 64 Fed. (2d) 224, the full quotation of the paragraph from which petitioner quotes shows clearly that that case has no application.

> "Contracts are ordinarily to be performed by business men, and should be given the interpretation which would be placed upon them by the business world. *Where one corporation presents to another corporation a form of agreement reciting, 'It is understood and agreed that this contract is entered into upon the following conditions: That it is our intention and desire to continue under this agreement so long as your services, in our judgment, prove satisfactory,' we have no doubt that such language would ordinarily be understood to mean a promise to continue until dissatisfied.*" (Italics represents part not quoted by petitioner.)

Daniel v. *Pappas*, 16 Fed. (2d) 880, involved a question of the meaning of the term "confectionery store purposes" in a lease of real estate in the City of Tulsa, Oklahoma, and

the question was, "What is included in the term 'confectionery store purposes' "?

The Court said:

> "* * * The evidence showed that it had become the established custom at the time the lease in question was entered into in Tulsa and vicinity for confectionery stores to serve lunches. In employing the language 'confectionery store purposes' the parties no doubt had in mind the business usually and ordinarily conducted in a confectionery store."

This is a situation far different from what we have.

In *Western Petroleum Company* v. *Tidal Gasoline Company,* 284 Fed. 82, a contract contained this phrase:

> "The price per wine gallon of said gasoline shall be three and one-half (3½) cents in buyer's cars, under the Standard Oil Company's tank wagon price, f.o.b. point of delivery * * * Chicago market."

Parol evidence was admitted to prove the "tank wagon price". Witnesses were permitted to testify that "tank wagon price" was understood by the industry to mean

> "* * * the announced price or basic price fixed by the Standard Oil Company of Indiana, at which the industry bought and sold gasoline."

The Court pointed out (84):

> "A usage, in order to change the plain import of language must be general, certain, uniform and of sufficient duration to justify an inference that the parties had it in view in making their contract."

The Circuit Court of Appeals followed the rule long established in the English courts, and adopted by this Court, for the construction of contracts of insurance.

Home Insurance Company v. *Baltimore Warehouse Company,* 93 U. S. 527, 23 L. Ed. 868.

> "* * * It is as true of policies of insurance as it is of other contracts that, except when the language is ambiguous, the intention of the parties is to be gathered from the policies alone. * * *."

Grace v. *American Central Ins. Co.,* 109 U. S. 278, 27 L. Ed. 932.

> "* * * In *Barnard* v. *Kellogg,* 10 Wall., 383 [77 U. S. XIX., 987], this court quotes with approval the language of *Lord* Lyndhurst in *Blackett* v. *Royal Exchange Assur. Co.,* 2 Cromp. & J., 249, that 'Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.' * * *"

Bergholm v. *Peoria Life Ins. Co.,* 284 U. S. 489, 76 L. Ed. 416.

> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. * * *."

There is no conflict between the decision of the Circuit Court of Appeals in this case and the decisions of this Court or of any of the other Circuit Courts of Appeals. Furthermore, the Circuit Court of Appeals found that the evidence did not

> "* * * show a universal trade custom or usage sufficient to overcome the plain meaning of words in the policy, it negatives the existence of such trade usage or custom."

The same evidence was presented in *The Morro Castle, supra,* in New York through two of the same witnesses, LaBoyteaux and Sullivan. It was disregarded by Judge Goddard, no error was assigned on this point, and it was not urged in the Circuit Court of Appeals.

The decision of the Circuit Court of Appeals is correct and is not in conflict with that of any other Circuit or of this Court. The question is not of any general importance because if the parties do not like the contract as construed by the Court they can procure another type of contract.

Respectfully submitted,

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